

NOT FOR PUBLICATION

[41]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPHINE S. MILLER,

Plaintiff,

v.

P.G. LEWIS & ASSOCIATES, INC.,

Defendant.

Civil Action No. 05-5641 (FLW)

OPINION and ORDER

APPEARANCES:

For Plaintiff:

JOSEPHINE S. MILLER
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Pro Se

For Defendant P.G. Lewis & Associates LLC:

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For Defendant Robert Half International, Inc.

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WOLFSON, United States District Judge:

This matter having been opened to the Court on Plaintiff, pro se, Josephine Miller's appeal of two Orders by the Honorable Magistrate Judge Tonianne Bongiovanni, U.S.M.J; the first Order, dated July 7, 2006, denied Plaintiff's Motion for Leave to File a Third Amended Complaint; the second Order, dated July 10, 2006, denied Plaintiff's Motion to Compel production of an expert report and the return of a laptop computer; the Court having reviewed the papers; this motion being considered pursuant to Fed. R. Civ. P. 78, and it further appearing that:

1. "A United States Magistrate Judge may hear and determine any [non-dispositive] pretrial matter pending before the court." Cardona v. General Motors Corp., 942 F. Supp. 968, 970 (D.N.J.1996); see also Fed.R.Civ.P. 72(a). The district court will only reverse a magistrate judge's decision on these matters if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); L. Civ. R. 72.1(c)(1)(A). The district court will not reverse the magistrate judge's determination, even in circumstances where the court might have decided the matter differently. Bowen v. Parking Auth. of City of Camden, 2002 WL 1754493, (D.N.J. Jul. 30, 2002). "A district judge's simple disagreement with the magistrate judge's findings is insufficient to meet the clearly erroneous standard of review." Andrews v. Goodyear Tire & Rubber Co., Inc., 191 F.R.D. 59, 68 (D.N.J.2000). A magistrate judge's ruling concerning discovery is non-dispositive. See, e.g., Cunningham v. Hamilton County, 527 U.S. 198, 201 (1999); Tarlon v. Cumberland Co. Corr. Facility, 192 F.R.D. 165 (D.N.J.2000). Where the appeal seeks review of a matter within the exclusive authority of the Magistrate Judge, such as a

discovery dispute, an even more deferential standard, the abuse of discretion standard, may be applied. Port Auth.v. Affiliated FM Ins. Co., 2001 U.S. Dist. LEXIS 7579, (D.N.J. Mar. 29, 2001); see also Envtl. Tectonics v. W.S. Kilpatrick & Co., 659 F.Supp. 1381, 1399 (D.N.J.1987) (citations omitted), mod., 847 F.2d 1052 (3d Cir.1988), aff'd, 493 U.S. 400 (1990); Cooper Hosp./Univ. Med. Ctr. v. Sullivan, 183 F.R.D. 119, 127 (D.N.J.1998). “This test displays considerable deference to the determination of magistrates in such matters.” 7 Moore’s Federal Practice ¶ 72.03(7.-3) at 72-42 (1989).

2. On June 16, 2006, Plaintiff filed a Motion for Leave to File a Third Amended Complaint. Specifically, Plaintiff sought to add three additional parties and additional predicate acts under the New Jersey Civil RICO Act. On July 7, 2006, Judge Bongiovanni denied Plaintiff’s Motion to Amend holding that amendment would be futile. On July 18, 2006 Plaintiff filed the instant appeal of Judge Bongiovanni’s Order. On review of the Order filed, this Court finds that Judge Bongiovanni did not adequately discuss the elements of the futility analysis and, specifically, whether it would be futile for Plaintiff to amend her Complaint regarding her claims pursuant to the New Jersey Civil RICO Act. Therefore, I remand this matter to Judge Bongiovanni for further review.

4. On June 29, 2006, Plaintiff filed Motion to compel production of an expert report and to compel production of Plaintiff’s laptop computer for purposes of examination by an independent forensic examiner. On July 11, 2006, Judge Bongiovanni denied this Motion. Specifically, Judge Bongiovanni held that pursuant to Fed. R. Civ. P. 37, a court may

only compel discovery between and among parties; because Plaintiff sought to compel production from non-parties to the action, the motion was denied. Moreover, Judge Bongiovanni noted that Plaintiff could have served a subpoena requesting the aforementioned documents and things from non-parties pursuant to the Rules of Civil Procedure. Thereafter, on July 27, 2006, Plaintiff filed the instant appeal of Judge Bongiovanni's Order.

5. Initially, the Court notes that at the time of Plaintiff's Motion to Compel, the parties from whom she sought to discovery were not parties in the Motion. Thus, I find that Judge Bongiovanni's ruling was correct¹. Moreover, the Court notes that pursuant to a September 6, 2006 letter submitted to this Court by the Plaintiff, it appears that Plaintiff served subpoenas requesting production of the laptop. Indeed, an Order issued by Honorable Judge Leonie M. Brinkema, U.S.D.J. in the Eastern District of Virginia affirmed this very fact. Thus, I find that Plaintiff's Motion to Compel is Moot.

And, for good cause shown,

IT IS on this 22nd day of September, 2006

ORDERED that Plaintiff's Appeal of Judge Bongiovanni's July 7, 2006 Order denying a Motion to Amend is REMANDED for Judge Bongiovanni's further review; and it is further

¹Indeed, at this juncture, Plaintiff's appeal of Judge Bongiovanni's Order denying Leave to Amend to add these plaintiffs is currently pending before me.

ORDERED that Plaintiff's Appeal of Judge Bongiovanni's July 11, 2006 Order denying her Motion to Compel is **DENIED**.

/s/ Freda L. Wolfson
The Honorable Freda L. Wolfson
United States District Judge